HO YORK QUIN of CHOP TECK CHONG PAWNSHOP v. R.

[A. Cr. J. (Sir Charles Murray-Aynsley, C.J.)
November 27, 1952]

[Singapore — Magistrate's Appeal No. 175 of 1951]

Pawnbrokers Ordinance (Cap. 216) s. 27 — Restitution of property — Discretion of Magistrate in making order or not.

This appeal arose out of an order made under section 27 of the Pawnbrokers Ordinance. The accused had been convicted under section 420 of the Penal Code for cheating in respect of a watch belonging to one Ong Loi Chan. The watch had been pawned by the accused with Chop Teck Chong Pawnshop, of which the appellant was the managing Partner. After the conviction of the accused, the learned Magistrate held he had no discretion but to order the return of the watch to the complainant, Ong Lai Chan.

Held: (1) the Court has the fullest discretion as to whether to make an order or not and in the order it makes if it should decide to make one; (2) it is a safe rule that in cases of doubt or difficulty an order should not be made.

[Editorial Note: In Sem Hin Pawnshop v. R. (1952) M.L.J. 164 Brown, J. held that where ownership having been proved, by common law the owner would be entitled to the articles unconditionally, however careless he had been. In a case where the conduct of both parties is free from criticism in no circumstances would the Court order the owner to pay a part of the loan; and the innocent pawnbroker must suffer for having taken a risk which is inseparable from his trade.]

Cases referred to:—

(1) *R. v. Nadaison* (1935) M.L.J. 148.

(2) *Leicester v. Cherryman* (1907) 2 K.B. 101.

MAGISTRATE'S APPEAL.

T. W. Ong for the appellant.

A. V. Winslow (Crown Counsel) for the Crown.

Cur. Adv. Vult.

Sir Charles Murray-Aynsley, C.J. : — This appeal arose out of an order made under section 27 of Pawnbrokers Ordinance (Cap. 216). The learned Magistrate considered he had no discretion in the matter and did not exercise his discretion. I exercised it for him.

This section follows the English Pawnbrokers Act of 1862. All that need be said is that the Court has the fullest discretion as to whether to make an order or not and in the order it makes if it should decide to make one. The matter was reviewed by Huggard, C.J., in the local case of *Nadaison*[1]. I only mention the matter because I think that case might prove misleading.

In the first place it should be noted that an order made under the Ordinance does not affect rights of property. It merely gives power to give possession. Whatever the order the Court makes, the owner can assert his legal rights (see *Leicester v. Cherryman*[2]).

The Court may make its order as "according to the conduct of the owner and the other circumstances of the case, seems just and fitting." The "other circumstances of the case" means in most cases the conduct of persons other than the owner.

As regards conduct, I think it can be said definitely that if the person seeking the order has been guilty of dishonesty, an order should not be made. In this respect I think the order made in the case reported, so far as it related to the property of *Nadaison*, is wrong. If in that case the defrauded pawnbroker had kept the goods, he could have counterclaimed with success if the thief had taken proceedings to recover them. In the cases where orders are made the conduct of the parties means therefore, in practice, negligence.

The common law is very tender to true owners whether negligent or not. Courts should not, in my opinion, make orders under this section except on terms where the true owner has failed to take reasonable care of his property.

It should be noted that the section merely gives power to order delivery. It does not confer power to give a judgment for a sum of money when the pawnbroker no longer has the property, as was done by Huggard, C.J., in the case referred to.

It is a safe rule that in cases of doubt or difficulty an order should not be made.

R. v. ANG ENG KEAT.

[Cr. R. J. (Spenser Wilkinson, J.) November 13, 1952]

[Penang — Criminal Revision No. 18 of 1952]

Customs Enactment, 1936, s. 108 — Forfeiture at conclusion of trial as part of punishment and on a separate application distinguished.

The accused was convicted of attempting to export motor tyres in contravention of the Prohibition of Export Order, 1949. The Magistrate refused the application of the prosecution for an order of forfeiture. Subsequently a separate application was made under section 108 of the Customs Enactment. The Magistrate again refused to make an order for forfeiture.

Held: under section 108(iv) of the Enactment, unless the claimant can prove that he is the owner and that the goods are not liable to forfeiture, it is the duty of the Court to carry out the machinery provided by section 108 by ordering a forfeiture.

Cases referred to:—

(1) *Tan Kee Guan v. Rex* (1949) M.L.J. 216.

(2) *De Keyser v. British Rly.* etc. (1936) 1 K.B. 224.

CRIMINAL REVISION.

C. M. Sheridan for the Crown.

C. O. Lim for the respondent.